

Message Text

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ACTION EB-11

INFO OCT-01 EUR-25 ISO-00 L-03 TRSE-00 SCA-01 CAB-09

CIAE-00 COME-00 DODE-00 DOTE-00 INR-10 NSAE-00 RSC-01

FAA-00 SSO-00 INRE-00 DRC-01 /062 W

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O 232058Z APR 74

FM AMEMBASSY OTTAWA

TO SECSTATE WASHDC IMMEDIATE 3263

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E.O. 11652: N/A

TAGS: ETRN, CA

SUBJECT: CIVAIR: PRECLEARANCE AGREEMENT--PRIVILEGES
AND IMMUNITIES

REF: STATE 081240

1. REFTEL DISCUSSED APRIL 22 BY TCO WITH SERGE APRIL
(EXTAFF LEGAL SPECIALIST FOR PRIVILEGES AND IMMUNITIES)
AND MCDOUGALL (OF FULFORD'S STAFF). LATER THAT DAY APRIL
UNDERTOOK A PRELIMINARY DISCUSSION WITH GOC DEPT OF JUSTICE
AND FOLLOWING PARAGRAPHS REFLECT HIS CONCLUSIONS BASED ON
THIS CONSULTATION. IN SUMMARY, APRIL SAW NO PARTICULAR
LEGAL PROBLEM TO PROVIDE IMMUNITY FROM PROCESS FOR FILES
AND EQUIPMENT OF PRECLEARANCE OFFICES, ALTHOUGH HE
QUESTIONED PRINCIPLE SUGGESTED BY US AS BASIS. HE
THOUGHT THERE WOULD BE PROBLEMS WITH RESPECT TO IMMUNITY
OF PERSONNEL IN PERFORMANCE OF THEIR OFFICIAL ACTS.

2. IDEA OF GRANTING IMMUNITIES FOR FILES AND EQUIPMENT
AS AN EXTENSION OF CONSULAR IMMUNITY GIVES GOC REAL
PROBLEMS BUT IT MIGHT BE DONE AS AN EXTENSION OF SOVEREIGN
IMMUNITY. IN GOC VIEW, PRECLEARANCE SIMPLY IS NOT A
CONSULAR FUNCTION AS DESCRIBED IN ARTICLE V OF VIENNA
CONVENTION ON CONSULAR RELATIONS OF 1963 (TO WHICH CANADA
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EXPECTS TO ADHERE ONCE CERTAIN TAX IMMUNITY ISSUES RAISED

BY MANITOBA HAVE BEEN OVERCOME) OR IN BROADER TRADITIONAL INTERNATIONAL PRACTICE. CONSEQUENTLY, FOR CANADA TO ACCOMMODATE PRECLEARANCE FUNCTION AS A CONSULAR ONE, NEW CANADIAN LEGISLATION AND NEW JURISPRUDENCE WOULD BE REQUIRED. AN ORDER-IN-COUNCIL GIVING EFFECT TO THE AGREEMENT, WHICH IS WHAT WOULD NORMALLY TAKE PLACE, WOULD BE INADQUATE. LEGISLATION PROVIDING GOC WITH AUTHORITY TO IMPLEMENT AN EXCHANGE OF NOTES WOULD REQUIRE PERHAPS A FEW YEARS TO PASS. ASIDE FROM POLITICAL WILLINGNESS OF FEDERAL GOVERNMENT TO PUT SUCH A MATTER ON A CROWDED PARLIAMENTARY CALENDAR, CONSULTATIONS WITH PROVINCES WOULD BE REQUIRED TO MAKE SURE THAT THEY HAD NO OBJECTIONS TO FEDERAL GOVERNMENT SO ACTING.

3. CONCEPT OF SOVEREIGN IMMUNITY AS A BASIS FOR IMMUNITIES FOR PRECLEARANCE FILES AND EQUIPMENT POSES NO SUCH PROBLEMS. CANADA IS ONE OF FEW COUNTRIES IN THE WORLD WHICH STILL ADHERE IN DOMESTIC LAW TO AN ABSOLUTE CONCEPT OF SOVEREIGN IMMUNITY. TCO ASKED APRIL ABOUT HIS UNDERSTANDING OF US PRACTICE IN THIS REGARD AND HE SUGGESTED THAT WHILE US VIEW WAS A MORE RESTRICTED ONE, HE WAS DOUBTFUL IF THIS SHOULD CAUSE ANY PROBLEM. IN ANY EVENT, A SIMPLE EXCHANGE OF NOTES MIGHT SPELL OUT SPECIFIC IMMUNITIES GRANTED WITHOUT REFERENCE TO WHAT PRINCIPLE WAS INVOLVED. USG COULD THEN PROMULGATE THIS AS DERIVED FROM CONSULAR IMMUNITY AND GOC AS FROM SOVEREIGN IMMUNITY.

4. UNDER CANADIAN JURISPRUDENCE US PRECLEARANCE OFFICES ALREADY ENJOY IMMUNITIES WITH RESPECT TO FILES AND EQUIPMENT. IF A COURT CASE EVER AROSE, COUNSEL FOR US INSPECTION AGENCIES WOULD SIMPLY PLEAD SOVEREIGN IMMUNITY AND IT WOULD BE RECOGNIZED BY COURTS. TCO THEN ASKED WHETHER, IF FOR ANY REASON A FORMAL EXCHANGE ON THIS SUBJECT NOT BE NEGOTIABLE, GOC MIGHT PROVIDE FOR THE RECORD A LEGAL OPINION SPELLING OUT THIS VIEW. APRIL READILY AGREED AND INDICATED THAT THIS MIGHT EVEN BE A PREFERABLE COURSE FROM GOC VIEWPOINT.

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5. WITH RESPECT TO IMMUNITY FOR PERSONNEL REGARDING ACTS PERFORMED IN THEIR OFFICIAL CAPACITIES, THERE DOES NOT APPEAR TO BE ANY WAY THIS COULD BE GRANTED IN TERMS OF SOVEREIGN IMMUNITY ANY MORE THAN IN TERMS OF CONSULAR IMMUNITY. HOWEVER, A REVIEW OF GOC LEGISLATION WILL BE UNDERTAKEN IMMEDIATELY TO SEE WHAT IMMUNITY CANADIAN CUSTOMS AND IMMIGRATION OFFICIALS ENJOY AND WHETHER US OFFICIALS IN CANADA CAN BE GIVEN SAME UNDER

THAT LEGISLATION. SHOULD THIS AVENUE NOT BE
FRUITFUL, ONLY POSSIBLE APPROACH MAY BE AN EXCHANGE
OF NOTES REQUIRING IMPLEMENTING LEGISLATION, AT
LEAST IN CANADA.

6. DISCUSSION ENDED WITH A COMMITMENT BY APRIL TO
CONSULT JUSTICE DEPARTMENT AND OTHER INTERESTED AGENCIES
WITH A VIEW TO HAVING A DRAFT PAPER AVAILABLE BY
APRIL 26 WHICH EMBASSY WILL FORWARD TO WASHINGTON.

7. DEPARTMENT REQUESTED REVIEW ABOVE URGENTLY AND
INDICATE ANY FURTHER POINTS WHICH SHOULD BE MADE TO
APRIL BEFORE THESE INTERAGENCY CONSULTATIONS RESULT
IN A FROZEN POSITION NOT COMPLETELY IN ACCORD
WITH OUR VIEWS.

8. EMBASSY NOTES THAT DISCUSSION WITH APRIL WAS
ENTIRELY FROM LEGAL VIEWPOINT. MACDOUGALL (POLICY
OFFICER), WHO ARRANGED MEETING IN ABSENCE OF FULFORD,
MADE NO CONTRIBUTIONS. APRIL WILL HAVE TO COORDINATE
WITH EXTAFF POLICY TYPES PLUS GOC TECHNICAL AGENCIES
BEFORE THERE IS A FIRM VIEW OF US WISH.
PORTER

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: DIPLOMATIC PRIVILEGES, AVIATION AGREEMENTS, FLIGHT CLEARANCES, CUSTOMS CLEARANCES, NEGOTIATIONS, CONSULATES
Control Number: n/a
Copy: SINGLE
Draft Date: 23 APR 1974
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: golinofr
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1974OTTAWA01177
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D740095-0434
From: OTTAWA
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1974/newtext/t19740421/aaaaasqb.tel
Line Count: 138
Locator: TEXT ON-LINE, ON MICROFILM
Office: ACTION EB
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 3
Previous Channel Indicators:
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: STATE 081240
Review Action: RELEASED, APPROVED
Review Authority: golinofr
Review Comment: n/a
Review Content Flags:
Review Date: 21 MAR 2002
Review Event:
Review Exemptions: n/a
Review History: RELEASED <21 MAR 2002 by collinp0>; APPROVED <07 MAY 2002 by golinofr>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: CIVAIR: PRECLEARANCE AGREEMENT--PRIVILEGES AND IMMUNITIES
TAGS: ETRN, CA, US
To: STATE
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005